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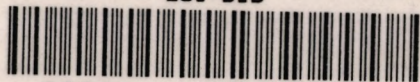
EUI Working Paper LAW No. 90/7

**Luhmann Conservative,  
Luhmann Progressive**

REINER GRUNDMANN

European University Institute, Florence

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**DEPARTMENT OF LAW**

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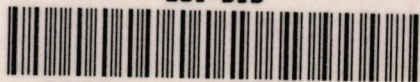
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# **Luhmann conservative, Luhmann progressive**

by

Reiner Grundmann

European University Institute

Florence

September 1990





of the subject and to the idea that individuals are the basic units of social action. But I shall not attempt to give a comprehensive exposition of the theory of autopoiesis as developed by Luhmann<sup>2</sup>. Instead, some aspects of Luhmann's ambitious and complex theory shall be picked out and treated in a rather non-systematic way, drawing on his contributions to legal theory and the critique of ideology. This shall be done so as to juxtapose his theoretical outline with those of Anglo-

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<sup>2</sup> From Luhmann's writings on the topic there are now available *Ecological Communication*. Cambridge: Polity Press (1989); *Essays on Self-Reference*. New York: Columbia University Press (1990, forthcoming). Stanford University Press prepares a translation of *Soziale Systeme*. For other contributions, see the articles in Humberto Maturana and Francisco Varela (eds.) *Autopoietic Systems. A Characterization of the Living Organization*, Urbana (Ill.) (1975); H. Maturana and F. Varela (eds.) *Autopoiesis and Cognition. The Realization of the Living*. Dordrecht: Reidel (1980); Milan Zeleny (ed.) *Autopoiesis: A Theory of Living Organization*, New York: Elsevier (1981); Gunther Teubner (ed.) *Autopoietic Law: A New Approach to Law and Society*, Berlin: de Gruyter (1988); Gunther Teubner (ed.) *State, Law, Economy as Autopoietic Systems*, Milano: Giuffr  (1990, forthcoming). For a lengthy review article, see Arthur J. Jacobson 'Autopoietic Law: The New Science of Niklas Luhmann' in 87 *Michigan Law Review* (1989), pp. 1647-1689. For a general representation of Luhmann's work in English, see his *Trust and Power*. Chichester: Wiley (1979); *Differentiation of Society*. New York: Columbia University Press (1982); *A Sociological Theory of Law*. London: Routledge (1985); *Love as Passion*. Cambridge: Polity Press (1986); *Political Theory in the Welfare State*. Berlin: de Gruyter (1990).

Reiner Grundmann

## **Luhmann conservative, Luhmann progressive\***

The lawyer has to legitimate the world as it is.

Jacob Taubes

If we presuppose society as it is the only thing we can do is to conserve it.

Niklas Luhmann

Writing on Luhmann for an Anglo-american readership, one could be tempted to adopt a habit of explaining *autopoiesis* in a way reminiscent of Lyotard's well-known booktitle<sup>1</sup>. This is not meant to be presumptuous or provocative. The theoretical traditions of German and Anglo-american thought are quite distinct, a fact which makes communication across the boarders difficult. The most single important difference is perhaps Luhmann's abolition of any appeal to the philosophy

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\* I wish to thank Niklas Luhmann, Sean Smith and Gunther Teubner for valuable comments.

<sup>1</sup> See J.F. Lyotard, *Le postmoderne expliqué aux enfants*. Paris: Galilée (1986).



american theorists, such as Rawls'. But some attention is also paid to Habermas' competing project. In fact, many of the Anglo-american audience know Luhmann's system theory only from a Frankfurtian reading. This reading nurtured a long-standing aversion towards systems theory which is regarded as technocratic<sup>3</sup>. The present article tries to reconsider such a judgement.

The two epigrams<sup>4</sup> at the beginning of the text seem to suggest that Luhmann is primarily interested in justifying existing order, not to criticise or to change it. However, this impression is contradicted by statements where Luhmann

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<sup>3</sup> Cf. Robert Lilienfeld, 'Systems Theory as an Ideology' in 42 *Social Research* pp. 637-660 (1975); Peter Ludz, 'Marxism and Systems Theory in a Bureaucratic Society' in 42 *Social Research* pp. 661-674 (1975).

<sup>4</sup> In the original they read as follows: 'Der Jurist muß die Welt, wie sie ist, legitimieren. Solange auch nur eine juristische Form gefunden werden kann, mit welcher Spitzfindigkeit auch immer, ist es unbedingt zu tun, denn sonst regiert das Chaos.' (Jacob Taubes, *Ad Carl Schmitt. Gegenstrebige Fügung*. Berlin: Merve (1987), p.72) and 'If society is supposed to be what it is, then the problem can be only to conserve society, to continue solving its problems, and possibly to improve problem solving and to overcome unexpected difficulties.' Niklas Luhmann, 'Tautology and Paradox in the self-Descriptions of Modern Society' in 6 *Sociological Theory* (1988), p.28.



defends himself against exactly such charges. For example, he says that he does not want to justify existing systems and their functions, that he does not in a normative way recommend the functions he describes<sup>5</sup>. How are we to resolve this paradox? Or, if it is no paradox, how are we to reconcile the two statements? One way to view this question is to draw a distinction between lawyers and sociologists. This would be a move which follows Taubes' dictum. According to this, Luhmann the lawyer would be the conservative, and Luhmann the sociologist would be the progressive. However appealing this suggestion may be, it is put into question by the fact that Luhmann's theory really does not lend itself to such a neat separation. The 'progressive' sociologist has to face the same problem as the 'conservative' lawyer.

I shall address both aspects in what follows. First, I focus on some aspects of Luhmann's legal theory (I.) and then turn to the problem of self-description of modern society -- a

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<sup>5</sup> Niklas Luhmann, *Legitimation durch Verfahren* (3rd ed. 1978), p. 6.

problem which commonly is dealt with in terms of 'critique of ideology' (II.).

## I.

Luhmann's writing on legal theory has been extensive from the mid 1960s onwards. Here, however, I shall focus mainly on two writings from the 1980s, viz. *Ausdifferenzierung des Rechts* and *Soziale Systeme*. In what follows I wish to direct the attention to the questions of justice, law, norms, values, and conflict.

Confronting Luhmann with authors like Habermas or Rawls, one would note that the concept of legitimacy, which plays a most important role in their theories, is treated by him in a completely different way.

### *Legitimacy*

For Luhmann, modern positive law provides its own legitimacy<sup>6</sup>, it is not dependent on an 'overlapping consensus'<sup>7</sup>, nor on an ethics of universal pragmatics<sup>8</sup>. Luhmann, therefore, is much nearer to Anglo-american ways of addressing this problem<sup>9</sup>. The tradition of positive law from Kelsen to Hart to Dworkin is shared by Luhmann. According to Luhmann, there is a decisive difference between ancient and modern law. Whereas the former derived its validity from its environment, i.e. from a 'divine' or 'natural' order, the latter derives its validity from its own operations. Modern law itself establishes what is legal which is to say, it itself establishes its own validity. There is no place in modern societies where an objective and rational instance would

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<sup>6</sup> Significantly, he avoids speaking about legitimacy and uses the term of *validity*.

<sup>7</sup> John Rawls *A Theory of Justice*. Oxford: Oxford University Press (1971).

<sup>8</sup> Habermas, *Theory of Communicative Action*, Vol 1 and 2, Boston: Beacon Press (1984) and Cambridge: Polity Press (1987).

<sup>9</sup> Our initial statement that Luhmann is quite distinct from Anglo-american thought has therefore to be attenuated, at least with respect to law.



reside<sup>10</sup> and which could provide a right answer. The reason therefore is, as shall become clearer in section II., that society has no possibility of perceiving itself as *society*. Only social subsystems are capable of self-observation and self-representation<sup>11</sup>.

Given this premise, how can we, for example, make sense of moral conflict? How is one to evaluate the persistence of radically divergent conceptions of the good in modern society? The general answer would be that Luhmann examines such questions not from the viewpoint of moral philosophy but from a perspective of the sociology of law. This is to say that moral questions are not looked at by a moral theory which would only lead to paradoxes or infinite regresses since a

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<sup>10</sup> See also Luhmann *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie*. Frankfurt am Main: Suhrkamp (1981); *Soziale Systeme*. Frankfurt am Main: Suhrkamp (1984); Translation *Social Systems*. Stanford: Stanford University Press (forthcoming).

<sup>11</sup> Cf. the opposing approach of Habermas, 'Können komplexe Gesellschaften eine vernünftige Identität ausbilden?' in *Zur Rekonstruktion des historischen Materialismus*. Frankfurt: Suhrkamp (1976). Habermas does not accept Luhmann's consequences; he tries to keep open the possibility for a 'future, rational collective identity'.

moral theory always wants to be 'good' and not 'bad'. Sociological inquiry, on the other hand, can afford to look at real mechanisms in a disinterested way. The cool and analytical view may be of greater help than a moral way of looking at things. We shall follow Luhmann in this orientation.

Perhaps the most important approach in this respect is Luhmann's elaboration of the theory of double contingency and its corollaries. Departing from the premise of double contingency in social life<sup>12</sup>, the question of how social order becomes possible is resolved by an analysis of the mechanisms which lead to a positive solution of this double indeterminacy. Expectations which can be fulfilled or frustrated (disappointed) become most crucial here. Basically there are two types of expectations: expectations which are open to learning and expectations which are not. The first

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<sup>12</sup> Talcott Parsons, Edward Shils et al. (1951) *Toward a General Theory of Action. Theoretical Foundations for the Social Sciences*. New York: Harper & Row, p. 16.

type is *cognitive*, the second *normative*<sup>13</sup>. The cognitive type is differentiated and institutionalised by science, the normative type by law.

### *Values and Norms*

For Luhmann, values are not generalized norms. Values are simply rules of preference, they do not contain claims about the *rightness* of social action. This would be possible only if a lexical ordering of values were at our disposal, for example, only if we could rank liberty, peace, culture, and profit on a scale, making sure that profit does not figure higher than liberty<sup>14</sup>. But it is commonly accepted that such a scale is not available to us<sup>15</sup>. On the contrary, we have innumerable values and their ranking is changing all the time. Values are used in communication to test if specific expectations are

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<sup>13</sup> Cf. Luhmann, *Soziale Systeme*, p. 437; *Rechtssoziologie*. Reinbek: Rowohlt (1972), pp. 40 ff. Translated as *A Sociological Theory of Law*, London: Routledge (1985).

<sup>14</sup> Luhmann, *Soziale Systeme*, pp. 433-4.

<sup>15</sup> Cf. also Luhmann 'Tautology and Paradox', *op. cit.*, p. 33.



realistic. In Luhmann's words, values are used in 'probing' specific expectations<sup>16</sup>

Turning to the use of the term 'norm' the following should be noted. Luhmann tries to find a middle way between natural rights theories and classical sociology. The former is concerned with finding or justifying *just norms*, the latter explains the existing social order in assuming a commonly shared normative orientation<sup>17</sup>. Take, for example, the following statement by Parsons:

'Furthermore, the double contingency implies the normative orientation of action, since alter's reaction of punishment or reward is superadded to alter's 'intrinsic' or direct behavioral reaction to ego's original selection. If punishment or reward by alter is repeatedly manifested under certain conditions, this reaction acquires for ego the meaning of an appropriate consequence of ego's conformity

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<sup>16</sup> Cf. Luhmann, *Soziale Systeme*; for the difference between values and programmes, see *ibid.*, pp. 432 ff.

<sup>17</sup> 'In contrast to the old European theory of society, we do not begin from normative presuppositions. Nor like Durkheim or Parsons do we view the concept of norms as the ultimate explanation of the fact or possibility of social order pure and simple.' Luhmann, *Soziale Systeme*, p. 444.



with or deviation from the norms of a *shared symbolic system*.<sup>18</sup>

In commenting on this passage, Luhmann points out that Parsons should have emphasized 'repeatedly' instead of 'shared symbolic system'<sup>19</sup>. This is to say, that only under the condition of repeated experiences a 'shared symbolic system' can arise: the dimension of time is constitutive of all social order. And it is precisely here that the 'norms' are located (cf. *ibid.*, p. 429). The task for social theory, therefore, is much more difficult.

The danger of the normative approach to norms lies in its naive idealism as is expressed in its basic assumptions of a social contract and the supposed situation of free choice at the point of its emergence. The danger of the classical

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<sup>18</sup> Parsons et al., *General Theory*, p. 16, orig. emphasis. The passage continues: 'A shared symbolic system is a system of 'ways of orienting', plus those 'external symbols' which control these ways of orienting, the system being so geared into the action systems of both ego and alter that the external symbol bring forth the same or a complementary pattern of orientation in both of them. Such a system, with its mutuality of normative orientation, is logically the most elementary form of culture... culture provides the standards (value-orientations) which are applied in evaluative processes.'

<sup>19</sup> *Soziale Systeme*, p. 175.

sociological approach (which takes existing norms as explanatory of social order) evades the question of how social order is possible in the first place. It begs the question since it refers the problem to the past supposing that it has already been solved. In other words, whereas the normative approach tries to find legitimate solutions for society, the sociological approach tries to explain social cohesion by an axiomatic setting of generally accepted norms. Which escape route does Luhmann propose?

According to Luhmann, holding oneself bound to norms is in effect a pervasive fact of social life which can be explained by the necessity of meaningful and self-referential reproduction of these norms. This approach is more ambitious in that it tries to show mechanisms of reproduction of norms in time. Norms and their reproduction are seen as an ongoing process. They emerge whenever meaningful generalizations are necessary which can be claimed in a counterfactual way. Expectations which are valid without respect to factual events are called generalized expectations. They leave open what exactly is expected since they have three dimensions: a

temporal, a material and a social dimension<sup>20</sup>. Norms are located in the temporal dimension whereas persons, roles, values and programmes are located in the 'Sachdimension' (cf. *ibid.*, pp. 429 ff.).

### *Law*

Those normative expectations which are not open to learning processes are obviously crucial. Normative expectations are conditioned by a sort of 'safety net', by the social institution of *law*. They can be further distinguished into conformant and deviant behaviour, viz. tolerated and prohibited behaviour. However, not all normative expectations are law. As Luhmann points out,

'Additionally, consensus must be presupposed not only for the normative style of expectation but also for the readiness to impose sanctions and for the carrying out of conflicts where these expectations are thwarted. In this respect, law is not only a means of solving social conflicts, but, in the first place, and most important, a means of creating social conflict: a prop for presumptions, demands

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<sup>20</sup> 'Zeit- Sach- und Sozialdimension', cf. *Soziale Systeme*, p. 445.



and rejections even in cases where resistance is expected.<sup>21</sup>

In claiming that modern law always plays the double role of creating and solving social conflict, Luhmann shows that he directly opposes Neo-Kantian theories such as Rawls' and Habermas'. To recall, Rawls' interest lies in the conditions for a 'just' society, Habermas' interest lies in a rational society in which consensus, founded solely on the force of the better argument, plays the constitutive role. For Luhmann, these considerations belong to a discourse whose presuppositions have been superseded by the conditions of modernity, i.e. by the condition of a highly differentiated society. For him, law supports behaviour which otherwise could not be sustained, for example in cases where one is the weaker or liable to be attacked on moral grounds. In this sense, law secures freedom, *including* freedom of conflict and freedom of socially undesirable behaviour. Neither ethics nor reason can achieve this fundamental function of law since both of them have to align themselves too strongly with desired or desirable

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<sup>21</sup> Luhmann, *Soziale Systeme*, p. 451, my transl.; see also Luhmann, *Ausdifferenzierung*, pp. 104-5.

results<sup>22</sup>. This indicates not only that Luhmann refuses Habermas' moral philosophy but also that he outstrips Rawls' liberalism.

Contradictions in society have the function of alarm signals, they serve as a sort of immune-system within the social system. Luhmann considers two complementary immune systems; law and conflicts. Law anticipates possible conflicts in selecting from the many everyday expectations those which might prove to be relevant. Law operates with the distinction legal/illegal and with the secondary coding of permitted/prohibited<sup>23</sup>. This leads to an increase in possible conflicts but also to a precise response from the legal system. It conceives conflicts as disturbances which must be overcome. Law can fulfil this function because it is detached from morals. It is therefore able to prohibit something permissible and to permit something prohibited.

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<sup>22</sup> Cf. *Ausdifferenzierung*, p. 105.

<sup>23</sup> Cf. *Soziale Systeme*, p. 511.

## Conflict

Conflict means the communication of a rejected expectation. Where 'No' is communicated, conflict gains social existence<sup>24</sup>. This is important to understand Luhmann's conceptualization of stability and instability in society. Returning to the above mentioned crucial role which expectations play in social life, the question of *instabilities* in social systems arises quite naturally. It is possible that an escalation of instabilities within social systems could lead to their self-destruction. We have seen above that values are used in testing the ground for behaviour. Here Luhmann, in a counter-intuitive manner, assigns also to conflicts the function of stabilizing systems since conflicts reduce the insecurity regarding expectations. Contrary to common usage, Luhmann attributes to conflicts the function that they *facilitate* social action. For example, in supposing that *alter* is the enemy (*Gegner*), ego gains certainty for further expectations. Conflicts enable ego to derive certainty in situations of uncertainty, precisely by means of

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<sup>24</sup> *Ausdifferenzierung*, p. 100.



conflict<sup>25</sup>. A conflict is the operational autonomization of a contradiction by means of communication<sup>26</sup>. It is therefore misconceived to explain conflicts by a failure of communication -- an explanation which presupposes that communication as such was something good which could fail. In Luhmann's version, conflict is separated from purely observed antagonisms of interests, from general contradictions, even from mutual damage<sup>27</sup>. Conflicts therefore exist *within* other systems without becoming subsystems themselves. Their mode of existence is purely parasitic. Nevertheless, conflict itself can be seen as a social system which operates according to its own logic, which spreads out, mobilises resources, demands time and eventually occupies the system in which the conflict was generated.<sup>28</sup> To relate

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<sup>25</sup> *Ausdifferenzierung*, p. 98.

<sup>26</sup> *Soziale Systeme*, p. 530.

<sup>27</sup> See *Soziale Systeme*, p. 531, note 62 for some references.

<sup>28</sup> It should be noted that not every social system is at the same time a functional subsystem of society. Generally, Luhmann considers the following as functional subsystems: economy, politics, science, law, religion, education, see, for example, Niklas Luhmann, *Ökologische Kommunikation*. Opladen: Westdeutscher Verlag (1986). Translated as *Ecological Communication*. Cambridge: Polity Press (1989).

this problematic to the legal system, it should be recalled (cf. *supra*) that law plays a double role here: conflicts are solved through law, and conflicts are generated through law. To prevent conflicts from spreading out too far and unfolding their destructive force, third parties play an important role in providing security on the basis of instability<sup>29</sup>. Third parties help to transform the conflict into 'issues' and to further decompose the theme of the conflict into smaller, manageable questions. It is significant that Luhmann does not speak of third parties as 'arbiters' which would probably suggest too strong a similarity to an *objective* overlooker. For Luhmann, the third party is neutral essentially in the beginning.

The important question which arises on the basis of this definition is the question of the conditions which determine the *selection* from the vast and pervasive existence of conflicts. In other words, which out of the innumerable conflicts which emerge every day gain significance beyond the level of interaction? Which conflicts gain general social

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<sup>29</sup> *Ausdifferenzierung*, pp. 107 ff., and the cited literature.

significance? It is the function of law and morals to check the suitability of special conflicts for general social communication. Conflicts are thereby conditioned either by restricting admissible means (e.g. violence), or by increasing insecurity (e.g. appeal to third parties)<sup>30</sup>.

Traditionally, law was the most important means of selecting among conflicts, to admit or to transport small conflicts into the social arena. In the transition to modernity, this legal function did not get lost but was based on different grounds. The semantics of nature were substituted by a semantics of freedom. Rights were attributed to individuals. This individualization leads to a decoupling of natural bonds which are, in turn, replaced by bonds which are freely chosen. People shift their attitudes and engagements, they follow fashions and moods. This leads to an aggregation and accumulation on the level of collective identities. The most important example is that of social movements. Social movements, like law, are selecting conflicts which are to have

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<sup>30</sup> Cf. Luhmann, *Soziale Systeme*, pp. 539 ff.



significance on a legal or political level. For example, race discrimination connected to immigration is taken up by a union or social movement and made into a political issue. This is the mechanism by which communications on the level of interaction get 'resonance' on the level of social systems.

### *Justice*

We are no longer able to describe single legal decisions as just or unjust. This is only possible with respect to the legal system as a whole. Traditionally, justice has been discussed in terms of perfection and perfectability<sup>31</sup>. However, within this notion of perfection there is also contained a weaker notion of development, since perfection is the end-state of a *development*<sup>32</sup>. In case the process of perfection does not exist

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<sup>31</sup> *Ausdifferenzierung*, pp. 378 ff. for some historical sources.

<sup>32</sup> See Philippe van Parijs *Evolutionary Explanation in the Social Sciences. An Emerging Paradigm*. London and New York: Tavistock (1981), p. 51 for a distinction between a strong ('evolutionist') and a weak ('evolutionary') form of evolutionary explanation. See, also, Karl E. Weick *The Social Psychology of Organizing*. Reading/Mass.: Addison-Wesley. Second edition (1979) p. 119 and Donald T. Campbell 'Variation and Selective Retention in Socio-Cultural Evolution' in *14 General Systems* (1969), pp.

or does not lead to its culmination (i.e. the realization of the idea), nevertheless, the process as such remains. This is to say that the notion of development substitutes the notion of perfection<sup>33</sup>. A reason why justice might not be perceived in perfectionist terms has to do with the structure of the legal system itself. The idea of perfect justice was related to a specific concept of the *unity* of the legal order, that is, to an order which consisted only of legal acts (*Recht*) but not of illegal acts (*Unrecht*). Only on this condition, i.e. that the illegal was excluded from the legal order, could a perfectionist perspective be derived. Conversely, if the legal system is conceptualized as containing both *Recht* and *Unrecht*, the perfectionist perspective becomes unfeasible since any development of the legal system develops both, *Recht* and *Unrecht*<sup>34</sup>. But how can we, on this basis, conceive of justice?

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69-85.

<sup>33</sup> See Luhmann's instructive, albeit tentative discussion of adaption, morphogenesis and teleology in *Soziale Systeme*, pp. 477 ff.

<sup>34</sup> *Ausdifferenzierung*, pp. 384 ff.

Luhmann provides the following solution: justice is *adequate complexity* of the legal system. The complexity of the legal system is adequate if and insofar it is compatible with concrete decisions within the system<sup>35</sup>. The criterion of justice is the extent to which the legal system can adequately deal with complexity. There may arise serious problems where the legal system increases its complexity up to a point where it can no longer come to decisions. In such cases the legal system would not have adequate complexity but simply would be blocked. The overburdening of the legal system can lead to a situation of *indeterminacy*. This would be the case when rights, norms and rules are made which are contradictory. For example, a right to a sound environment may be incompatible with a right to property and free enterprise, and may lead to indeterminacy in the case of an entrepreneur who pollutes the environment. As Luhmann maintains, this problem is a real danger for the legal system because the demands of society press the legal system ever more in the direction of increased complexity. However, the complexity

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<sup>35</sup> *ibid.*, p. 390.



demanding by society is always higher than the complexity which can be realized within the legal system; only a small range of social actions can become legally relevant facts<sup>36</sup>.

The consequences of this approach are startling, even frightening, as Luhmann himself admits. Luhmann concedes that Habermas and others have a justified concern in criticising actual legal practices. However, Luhmann argues, such criticisms are bound to remain on the level of 'experience' (*erleben*), they cannot be transformed into modes of action at the level of the system. The spheres of action and of experience are divided sharply in modern societies<sup>37</sup>. More generally speaking, this criticism is directed against the illusion that a substantive concept of justice might be available to us which in turn could be applied to single cases. The only criterion which remains seems to be the rule to treat equal cases equally and unequal cases unequally. This device seems to secure the compatibility required within the legal

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<sup>36</sup> Cf. *ibid.*, p. 392 and generally, *Soziale Systeme*, pp. 249 f.

<sup>37</sup> *ibid.*, p. 389 note 33.

system and to make decisions easier. In a way, this rule also helps to *reduce* complexity<sup>38</sup>.

For Luhmann, then, there can be no ultimate criteria of justice (or: of legitimation) *behind* the legal system. It is the legal system itself that creates law and it is a feature of positive law that it provides the validity (*Geltungsgrund*) of its own. Against Rawls' idea of an 'overlapping consensus' and against Habermas' claim that legality has been sustained from outside the legal system by *legitimacy*, Luhmann holds that positive law is never supported by a real consensus<sup>39</sup>. More generally, legitimation is generated within the political system, that is, outside the legal system. Conversely, Habermas seems to claim that law cannot be conceived as a subsystem of society since it has not lost its inherent links to politics and morals<sup>40</sup>. This is to say that law has to cope with questions

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<sup>38</sup> *ibid.*, pp. 391, 406.

<sup>39</sup> *ibid.*, p. 1981: 132.

<sup>40</sup> Cf. Jürgen Habermas, 'Law and Morality', *The Tanner Lectures on Human Values* vol. VIII, ed. M. McMurrin. Cambridge: Cambridge University Press, (1988); 'Towards a Communication-Concept of Rational Collective Will-Formation. A Thought Experiment' in *Ratio Juris* 2 (1989), pp.144-154.

of legitimation as well as with questions of moral justice. To be sure, Habermas takes great pains to prove this point with historical and theoretical arguments; however, in my view, his position often cannot avoid giving the impression that it does not admit what would not be desirable from a normative viewpoint.

Rawls and Habermas are similar to natural law theorists in adopting a schema according to which conformity and deviance select among social behaviour. However, according to Luhmann, under the conditions of modernity we witness a further differentiation. According to his analysis, it is a basic trait of functionally differentiated societies that social links get loosened. As a result of the process of individualization<sup>41</sup> we have to reckon with the possibility that the norm-schema as such gets challenged. This possibility stems from the fact that people are socialized and governed by *codes*, not by persons<sup>42</sup>.

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<sup>41</sup> See also Stephen Holmes 'Aristippus in and out of Athens' 73 *The American Political Science Review* (1979), pp. 113-127.

<sup>42</sup> In a similar way, Marx claimed that people in modern capitalist societies are dominated by *abstractions*, cf. Karl Marx *Grundrisse*. Berlin: Dietz (1953), pp. 81f.



'Codes' are differences, like power/weakness, legal/illegal, true/false, good/evil etc. Therefore real dangers arise if whole populations are governed and socialized by such codes over several generations<sup>43</sup>. Using the concept of the re-introduction of the *excluded third*<sup>44</sup>, results in modern societies, as a consequence of their own operations, producing a 'quiet reservoir for protest movements of all kinds'<sup>45</sup>. Insofar as social movements engage in a rejection of this norm-schema, they are not likely to be successful since they limit themselves to abstract negation. They are also dangerous insofar as they want to reverse functional differentiation. With regard to authors who try to combine the viewpoint of the legal system with that of social movements under the heading of 'civil

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<sup>43</sup> Cf. *Soziale Systeme*, pp. 44-5. It seems ironic that Luhmann, who eschews any reference to the humanist tradition of thought at the level of his theoretical design, seems to be inspired exactly by 'humanism' when -- however cautiously -- criticising the present state of affairs.

<sup>44</sup> Drawing on Michel Serres, *Le Parasite*. Paris: Grasset et Frasquelle (1980) and George Spencer Brown, *Laws of Form*. 2nd. ed. London: Allen & Unwin (1971).

<sup>45</sup> Cf. *Soziale Systeme*, p. 313.

disobedience', Luhmann holds that they tend to forget that society's stability calls for a clear 'Yes for society'...<sup>46</sup>

But let us now see in which way Luhmann analyzes the problem of modern society's self-description and in which way his version of systems theory has affinities to conservative or progressive ideologies.

## II.

Luhmann draws a radical conclusion from the widely accepted sociological view that modern societies are functionally differentiated. The conclusion is that there is no centre or top which would allow for a privileged point of observation or description of the *whole* of society. Or, more precisely, they have no means to re-introduce the unity of the social system into the social system *via* self-observation or self-description. Modern societies, instead, invent self-

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<sup>46</sup> *ibid.*, p. 550.

descriptions in the form of ideologies. Ideologies are simplifying and focus always on particular features of the system in question. Luhmann distinguishes between conservative and progressive (revolutionary) ideologies. At the basis of these ideologies there is a curious type of self-reflexion of society. Whenever societies reflect on their unity, they have two basic forms of self-description and self-reflexion: tautology and paradox. In the tautological version, society is what it is. In the paradoxical version, society is what it is not<sup>47</sup>.

These two versions correspond to the conservative-/progressive distinction and it is easy to see how. Whereas conservative ideologies affirm the existing social order (i.e. functional subsystems in Luhmann's terms), progressive or revolutionary ideologies see society as what it is not. They try to bring about a society which does 'not yet' exist. Conservative ideologies have it that society's potential is realized, therefore all that remains to be done is to improve

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<sup>47</sup> Cf. for the following, Luhmann, 'Tautology and Paradox', *op. cit.*



on its problem-solving. Conversely, revolutionary ideologies have it that society's potential has still to be realized, therefore society is what it is not (yet).

This leads to a self-blocking of both the observed system and the observer since we do not get out of the problem in analyzing it. What we have to do, Luhmann recommends, is to look at how the system itself un-blocks the situation. And it does this through the 'unfolding' of its self-referentiality in breaking it up and interpreting it in one way or another. The choice itself cannot be justified. Such an operation of de-  
tautologizing and de-paradoxizing demands that both the operation and the underlying problem be concealed.

Modern society uses this form of resolving its paradoxes but it cannot admit that it does. Neither can it admit that its attempt at self-description amounts to tautologies and paradoxes in the first place. It conceals its identity and is by this means (and only by this means) able to form a reflective theory. And only an observer can see this. Only he can see what the system itself cannot see. And Luhmann, as the

theoretical mouthpiece of this problematic, is caught up in exactly the same situation<sup>48</sup>. Here one could ask the following questions: Where does Luhmann stand? Is Luhmann Luhmann or is Luhmann not Luhmann? Luhmann would not have been Luhmann had he not taken pains to avoid a simple answer. One might object here (and Luhmann did so) that I am focussing too strongly on personal features, thereby neglecting the more general problem which systems theory as such faces. However, I think it is legitimate to discuss Luhmann's thought in a prominent way since it is he who gave systems theory a specific brand. Certainly, the ideological implications of the Habermas/Luhmann debate at the beginning of the 70s stamped him as a 'conservative'<sup>49</sup>, and,

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<sup>48</sup> There might be some controversy on the point of whether Luhmann's theory is simpler or more complex than social reality. For the sake of the argument let us assume that the theory and its object have more or less the same complexity.

<sup>49</sup> Cf., for example, Habermas' verdict that systems theory amounts to a 'negative utopia of technical control over history' in which human no longer occupied the position of *homo faber* but of *homo fabricatus* (Habermas, 'Technology and Science as 'Ideology'' in *Toward a Rational Society*. Boston: Beacon (1970), p. 106; see also Thomas McCarthy, 'Complexity and Democracy, or The Seductions of Systems Theory' in *New German Critique* 35 (1985), p. 28. But Habermas himself made considerable use of that theory after the debate with Luhmann. As Thomas McCarthy remarked, Habermas in *Theory of Communicative Action* seems to admire

at times, it seems as if he would happily accept this label knowing that the assertion of good intentions gives rise to contrary suspicions. But apart from these partly idiosyncratic features of the debate such a characterization would not do justice to his theory.

In other words, if Luhmann proceeds in the same way as modern societies do, might it not be, then, that Luhmann himself hides away behind paradoxes and tautologies? He has to decide whether to take the side of tautology (conservatism) or the side of paradox (progressivism), and if he does, he has to hide the operation<sup>50</sup>. From Merleau-Ponty, Bateson, and

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'Luhmann's conceptual and theoretical virtuosity' (*ibidem*, p.47) -- but for McCarthy 'it is not clear just where the need for systems theory arises' (*id.*, 51). True enough, Habermas' left-wing audience always watched with suspicion the fact that the master took up theoretical tools from systems theory. In their view, Habermas was compromising with the devil.

<sup>50</sup> Cf. also Ricoeur: 'Because the absolute overlooker is impossible, then it is someone within the process itself who takes the responsibility for judgement.' However, Ricoeur claims that this taking of a viewpoint amounts to advancing a *utopian* model on the basis of which one envisages 'a better future for humanity'. In consequence, he replaces the distinction ideology/science with the distinction ideology/utopia, cf. Paul Ricoeur, *Lectures on Ideology and Utopia*. George H. Taylor ed. New York: Columbia University Press (1986), pp. 172 f.



Spencer Brown, Luhmann takes up the message 'Draw a distinction!' Making a distinction establishes a universe, sets up systemic boundaries, structures a discourse. Once the distinction is made, we are talking about this, and not about that. In a often repeated and somewhat cryptic phrase we are told that it is a difference which makes the difference<sup>51</sup>. Here we can distinguish between two levels, the level of reality (where real events create differences and real systems establish their unity) and a level of observing these systems. The latter activity, usually called second-order observation, exposes itself in turn to observation. Or, in the words of Heinz von Foerster: 'I submit that the cybernetics of *observed systems* we may consider to be first-order cybernetics; while second-order cybernetics is the cybernetics of *observing systems*.'<sup>52</sup>. From this standpoint it may be claimed that the distinctions which are drawn by an observer only express his

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<sup>51</sup> See, for example, Gregory Bateson, *Steps to an Ecology of Mind*. San Francisco: Chandler (1972), p. 315.

<sup>52</sup> Heinz von Foerster, 'Cybernetics of Cybernetics' in K.rippendorff (ed.) *Communication and Control in Society*. New York: Gordon & Breach (1979), p. 7, emphasis added.

*bias*<sup>53</sup>. It would follow that the observer is not able to exempt himself/herself from the strictures of the observed objects since he draws just some other differences without ever being able to reach the 'view from nowhere', i.e. absolute truth. Every observation is made on the basis of a blind spot. The observer cannot see what he cannot see. This is possible only for other observers. Luhmann resorts to second order cybernetics to avoid precisely the 'paradox of the subject', i.e. that there is some ultimate instance which does not fail<sup>54</sup>.

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<sup>53</sup> This is a corollary of the fact that an observer uses distinctions which he cannot thematize while applying them.

<sup>54</sup> In a brilliant discussion of Mannheim's sociology of knowledge, Ricoeur comes to a similar conclusion. He advances a 'post-marxist concept of ideology' which becomes inevitable once 'we acknowledge that the objective ontological unity of the world has collapsed. We live spiritually in a polemical situation of conflicting world views which are, for one another, ideologies. We face a process of mutual labelling; an ideology is always the ideology of the other.' (Ricoeur, *Lectures*, p. 163). The reason why the marxist concept of ideology no longer works, is spelled out in the following way: 'For Mannheim ... the process of disintegration has proceeded so far that all class consciousnesses are caught in the destructive process of collapse. There is a *lack of a center* in the evolution of human society. Because there is no true universality anywhere, no group may claim to be the bearer of universality.' (*ibidem*, emphasis added).



Society as such is not able to produce true self-descriptions, therefore it resorts to ideologies. These ideologies are essentially based on tautologies and paradoxes. However, according to Luhmann, tautologies and paradoxes are of little help. Both are essentially sterile. An observer cannot predict which of the two possibilities will be chosen, nor can he recommend which to choose, nor can he predict what consequences will follow in adopting one or the other.

Let us now engage in observation of observation and look at Luhmann's theory with the same conceptual tools. We ask: which side does Luhmann take? Where is his blind spot? One could say that as far as the purely theoretical apparatus is concerned, such questions do not arise. But they certainly do arise as soon as practical implications come to the fore and here he seems to have a conservative bias<sup>55</sup>. For example, he

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<sup>55</sup> Cf. Cesare Luporini 'Governare il mondo o cambiarlo' in *22 Problemi del Socialismo* (1981), pp. 57-70; Danilo Zolo 'Autopoiesis. Un Paradigma Conservatore' *1 MicroMega* (1986), pp. 129 ff.; Ulrich Rödel, Günther Frankenberg and Helmut Dubiel (1989) *Die demokratische Frage*. Frankfurt: Suhrkamp; Günther Frankenberg 'Unordnung kann sein. Versuch über Systeme, Recht und Ungehorsam' in A. Honneth, T. McCarthy, C. Offe & A. Wellmer (eds.) *Zwischenbetrachtungen im Prozeß der Aufklärung*. Frankfurt: Suhrkamp (1989) for some recent statements.



clearly favours society's stability<sup>56</sup> and 'Rechtssicherheit' which in the view of many leftists would be a conservative Hobbesian standpoint<sup>57</sup>. But the meaning of the terms conservative and progressive are shifting as a result of the *temporalization* of ideologies. Luhmann draws on Reinhard Koselleck's work<sup>58</sup> who showed how many concepts, among them 'ideology', in the middle of the 18th century changed their meaning. They were no longer linked to *nature* but to historical time and the present situation of society. Accelerated social change undermines the opposition conservative/progressive and leads partly to an interchange of

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<sup>56</sup> Niklas Luhmann, 'Widerstandsrecht und politische Gewalt' 5 *Zeitschrift für Rechtssoziologie* (1984), p. 36.

<sup>57</sup> With slight irony he remarks that people in Germany reacted in an allergical way even to a planned census, see Luhmann 'Wer sagt das?' *Delfin* 12 (1989), p. 90. In an Interview he said: 'Weil mir gar keine andere Gesellschaft vorschwebt als die, die wir haben, will ich auch die vielen positiven Seiten unseres Systems aufzeigen. Es geht also nicht um Ablehnung oder Zustimmung zu dieser Gesellschaft, sondern um ein besseres Verständnis ihrer strukturellen Risiken, ihrer Selbstgefährdungen, ihrer evolutionären Unwahrscheinlichkeit.' 'Biographie, Attitüden, Zettelkasten' in D. Baecker and G. Stanizek (eds.) *Niklas Luhmann. Archimedes und wir. Interviews*. Berlin: Merve (1987), p. 155.

<sup>58</sup> Cf. Reinhart Koselleck, *Futures Past. On the Semantics of Historical Time*. Cambridge, Mass./London: The MIT Press (1985).

themes and issues between the sides. For example, many on the political left are dealing *today* with themes like cultural pessimism, critique of technology and call upon the state (e.g. to prevent ecological crises) -- clearly old issues of the political right<sup>59</sup>. This insight is all the more significant in a situation which lacks clear answers to the question 'What is left?'

But even on the theoretical level the question is not so easy to decide. Contrary to many criticisms which have it that Luhmann's practising of the functional method has conservative implications, one could claim that this method, conversely, leads to a critical approach. The potential for criticism lies in the fact that existing arrangements are interpreted in a way which stresses their contingency. That which is contingent is neither necessary nor impossible. 'Kontingent ist etwas, was weder notwendig ist noch unmöglich ist; was also so, wie es ist ... sein kann, aber auch anders möglich ist.'<sup>60</sup>. To show both that things are possible

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<sup>59</sup> Cf. the curious self-description of the German Green Party 'We are neither left nor right, but far ahead'.

<sup>60</sup> *Soziale Systeme*, p. 152.

the way they are and that they could be otherwise gives the theory critical potential. To put the problem in this way, however, is also to reformulate the difference between tautology and paradox. Things are what they are and they are what they are not. However, Luhmann indicates yet another important difference between tautology and paradox. He refuses to treat them as logically a pair, since they are not equivalent. A tautology can be seen as a paradox, whereas the reverse is not true. Tautologies are differences which do not make the difference. In this way Luhmann explains why many people think it quite natural that intellectuals have a bias towards left-wing politics, since it is more challenging and fruitful to resolve paradoxes than tautologies. Another formulation is significant here. When Luhmann speaks of the merits of second order cybernetics (the observing of the observer) he emphasizes that this is the only possible goal of *enlightenment* (Aufklärung) which does not lead to well-known self-contradictions<sup>61</sup>.

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<sup>61</sup> 'Tautology and Paradox', *op. cit.* p. 35.



Luhmann has been reproached also with respect to his judgement of the new social movements. What does his conservatism amount to? Obviously there is his stance to 'defend' society against protest movements which, in their various radical guises, ultimately or implicitly demand the abolition of functional differentiation of society. According to Luhmann, such a criticism is a moral criticism since it cannot show the alternatives *for society*. It cannot be taken seriously as a social criticism since it confronts social operations with criteria alien to them. For example, modern society is criticised as 'inhuman' because its economy operates on such distinctions like having and not having property. The political system operates on the basis of having or not having power. Both systems thus produce people on the 'shadowside', i.e. poor and powerlessness. Whereas a *social* criticism would try to change certain (undesirable) states of affairs taking into account the basic modes of operation, a moral criticism would just reject such outcomes and the systems which produce them<sup>62</sup>. However, such moral communications just trickle

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<sup>62</sup> A famous slogan from the students' movement was 'The system makes no errors, it is the error'.

away, they are not able to cause resonance in the functional subsystems of society. They remain on the level of interaction. Let us change perspective and perceive the moral criticism from the standpoint of society. Here the moral criticism can be understood only in terms of society's self-destruction. This is the case if its stability, i.e. its form of differentiation, its way of drawing its systemic boundaries, is challenged. Such a challenge can only be conceived by society as its own catastrophe. If the basic principles of social organization are threatened, society disintegrates. Luhmann, the sociologist, seems tempted to take the standpoint of society. But if he were to, he would be attempting something which, according to his theory, is impossible.

The question of whether Luhmann succeeds in resolving his paradoxes remains an open one. Is Luhmann Luhmann or is he not Luhmann? Is he breaking the self-referentiality and privileging one over the other, thereby concealing his operation? The observers of his theory are invited to find out themselves, to see what he has not seen.







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